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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

HECTOR TORRES,

Plaintiff,

vs.

BELLAGIO, LLC, a Nevada corporation;

Defendant.

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Case No.: 2:17-cv-01025-JAD-VCF

FIRST AMENDED COMPLAINT

COMES NOW Plaintiff, HECTOR TORRES by and through Counsel, the law firm of
KEMP & KEMP, and hereby complains and alleges the following:

JURISDICTION AND VENUE

1. This is a civil action for damages brought by HECTOR TORRES (“Plaintiff”) against his
former employer, BELLAGIO, LLC (“Defendant”) to redress its discriminatory treatment and
retaliation against Plaintiff in violation of the American With Disabilities Act of 1990 (herein
“ADA”) as amended in January 2009, 42 U.S.C.A § 12101 *et. seq.*

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2. On or about April 22, 2016, Plaintiff filed an unperfected Charge with the United State Equal Employment Opportunity Commission (herein “EEOC”).

PARTIES

1 wherever the identifying word Defendant is used in relationship to Defendant, it encompasses
2 actions by and through its agents, directors, officers, managers, supervisors, and employees.

3 **FACTS COMMON TO ALL CLAIMS**

4 10. Plaintiff was first employed by Defendant on November 16, 1998 as a Cook Helper in
5 Defendant's Le Cirque restaurant at and had worked at various restaurants during his 18 year
6 employment history with Defendant. In 2005, Plaintiff bid on, and received, a position as a
7 Cook at Le Cirque.
8

9 11. Plaintiff sustained an industrial injury on April 10, 2012, injuring his back while lifting a
10 box of chicken. Plaintiff sought immediate medical attention for his industrial injury being seen
11 and treated by Concentra Medical Center's medical personnel.
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13 12. Plaintiff was allowed by his doctors to return to work on April 12, 2012, but with
14 restrictions limiting his workplace activities including a 10 pound lifting, pulling and pushing
15 restriction. Plaintiff was to be treated with light duty, medications, and physical therapy.

16 13. Plaintiff's follow up appointment with Concentra on April 23, 2012, saw the institution
17 of additional restrictions to further aid in his recovery from the industrial injury.

18 14. On April 24, 2012, Plaintiff was placed on a light duty assignment in Defendant's Pool
19 Café.
20

21 15. Plaintiff continued to experience symptoms from his industrial injury, but was released to
22 full-duty without restriction on September 21, 2012, under a generally improved, but non-
23 discharged status.

24 16. Plaintiff made informal requests of Management to provide him reasonable
25 accommodations when he was experiencing distress from his industrial injury. Plaintiff's
26 request fell on Management's deaf ears.
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1 17. On October 24, 2012, Plaintiff filed a Charge with the EEOC for discrimination and
2 retaliation in violation of the American With Disabilities Act among other claims.

3 18. On November 6, 2012, Plaintiff made a formal written request for reasonable
4 accommodations to perform his job. Defendant provided Plaintiff a form to have his treating
5 physician complete.
6

7 19. On November 14, 2012, Defendant was provided with Plaintiff's treating physician's
8 recommendation and the criteria that Defendant should consider when providing reasonable
9 accommodations to Plaintiff. This included placing Plaintiff in a position where there would be
10 limited standing, bending, pushing or pulling.

11 20. On December 27, 2012, Defendant denied Plaintiff's request for reasonable
12 accommodation stating there is no reasonable accommodation available that would allow
13 Plaintiff to perform the essential functions of his job. Ultimately, Plaintiff was terminated.
14

15 21. In February 2013, Defendant offered Plaintiff his job back and agreed to provide
16 reasonable accommodations, as required by law.

17 22. Defendant breached its legal obligation and agreement to provide reasonable
18 accommodations to Plaintiff almost immediately after his reemployment began. On April 6,
19 2013, April 29, 2013, and May 15, 2013, Plaintiff provided Defendant with written statements
20 regarding Management's refusal to allow Plaintiff reasonable accommodations. This would be
21 followed by a series of unfounded disciplinary actions taken against Plaintiff including write-
22 ups, unpaid suspensions, and due process meetings. Plaintiff would retain his employment and
23 soon was assigned as a cook in another of Defendant's restaurants, Snack's Kitchen.
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25 23. Plaintiff sustained another industrial injury to his back on April 21, 2015.
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1 24. On or about April 23, 2015, Plaintiff was placed on a light duty assignment as a server in
2 the employee's dining room ("EDR") the duration of which was "until released to return to full-
3 duty work" by his "treating physician or until the assignment is completed."

4 25. On or about March 4, 2016, Plaintiff's treating physician determined he had achieved
5 maximum medical improvement and would have permanent work restrictions due to the lumbar
6 spine pathology noted on his radiographic studies. Those permanent work restrictions cause
7 substantial limitations to Plaintiff's major life activities including standing, lifting, bending,
8 pushing, pulling, and working all which qualify as disabilities under the ADA. Plaintiff was not
9 released to full-duty, but was released to work with permanent work restrictions.
10

11 26. On March 17, 2016, during a meeting between Plaintiff and Defendant's Employee
12 Relations representative, Jessica Harbaugh, Plaintiff requested he be provided the reasonable
13 accommodation of continuing to work in the EDR. Plaintiff's proposed reasonable
14 accommodation was denied. Plaintiff was engaging in conduct protected under the ADA when
15 he requested a reasonable accommodation.
16

17 27. Defendant's documentation states Plaintiff would remain in his position as a server in the
18 EDR "until released to return to full-duty work" by his "treating physician or until the
19 assignment is completed." Plaintiff was not returned to full-duty. Furthermore, unless the EDR
20 has closed (which it has not), the position Plaintiff held in the EDR for almost year was a
21 position that Defendant needs to continue to fill. Such reasonable accommodation would have
22 permitted Plaintiff to perform the essential functions of his job and would not have caused any
23 undue hardship on Defendant. Defendant instead opted to terminate Plaintiff's employment.
24

25 28. Defendant is a self-insured employer and self-administers its workers' compensation
26 claims. Defendant has access to Plaintiff's medical records as applies to his industrial injuries
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1 and is aware of his diagnosis, the resulting work restrictions that were caused by his industrial
2 injuries, and the resulting limitations to one or more of Plaintiff's major life activities including
3 limited standing, bending, pushing, pulling and working.

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5 29. Defendant not only knew Plaintiff had a physical impairment within the meaning of the
6 ADA that limits one or more of his major life activities because of his 2015 industrial injury, but
7 Defendant also knew of his 2012 industrial injury, Plaintiff's request for a reasonable
8 accommodation at that time, and the granting of an accommodation at that time. In other words,
9 there was a record of Plaintiff having an ADA qualifying disability and Defendant regarded
10 Plaintiff as being disabled providing him with a reasonable accommodation.

11
12 30. Plaintiff was qualified for his job with or without a reasonable accommodation and had
13 been performing his job with an accommodation for almost two years prior to Defendant's
14 second termination of his employment in April 2016.

15
16 31. On March 17, 2016, Defendant invited Plaintiff to apply for a new position through
17 Defendant's Assisted Job Search program. Defendant utilizes this program to violate the ADA
18 by manipulating disabled workers to leave employment by forcing injured workers to settle their
19 workers' compensation claims with a vocational rehabilitation lump sum buyout rather than truly
20 offering to accommodate their disability. Among other provisions the workers' compensation
21 Assisted Job Search Agreement includes Plaintiff waiving his right to initiate the job search so
22 he can be released from Defendant's employment to enter Vocational Rehabilitation rather than
23 engaging in an interactive process to maintain employment. Defendant's documentation
24 supports this by stating on April 21, 2016, Plaintiff "is a WC [workers' compensation] employee
25 who is being termed [terminated] to Voc. Rehab [Vocational Rehabilitation]."

1 32. Vocational Rehabilitation is an avenue of settlement for workers' compensation claims. It
2 is not a reasonable accommodation under the ADA. An employee's rights under the ADA are
3 separate from his entitlements under workers' compensation law. Defendant's Assisted Job
4 Search program was not offered to Plaintiff as part of the ADA interactive process, but as part of
5 his workers' compensation claim.
6

7 33. To participate in Defendant's Assisted Job Search program to address Plaintiff's workers'
8 compensation claim, Plaintiff was required to sign the agreement stating he understood and
9 agreed he was allowed to use the Assisted Job Search program for 30 days, that if he cannot find
10 a position within that time he would be terminated, and that he was not guaranteed a position
11 simply by participating in the Assisted Job Search program.
12

13 34. Defendant had an affirmative duty under the ADA to participate in good-faith in the
14 interactive process. Even if it could be argued that Defendant's Assisted Job Search program for
15 workers' compensation claims was an attempt to engage in the interactive process required under
16 the ADA, offers which "invite" a disabled employee to apply and compete for a different job are
17 not offers of a reasonable accommodation and violate the ADA. In addition during the workers'
18 compensation Assisted Job Search process, Defendant merely provided Plaintiff with job
19 listings, but did not speak with Plaintiff about his ADA qualifying disability, did not explore
20 Plaintiff's permanent work restrictions, did not converse with Plaintiff about what each job on
21 the list required as far as physical limitations, did not discuss with Plaintiff whether he could fill
22 any of the listed jobs with or without a reasonable accommodation, and did not ask Plaintiff to
23 obtain a doctor's evaluation of his work restrictions and what accommodations would be
24 required. Instead, Defendant merely said Plaintiff could apply for and compete for open jobs
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1 listed on the sheet and then terminated his employment. This does not fulfill Defendant's
2 affirmative duties and, thereby, violates the ADA.

3 35. Defendant terminated Plaintiff's employment on April 21, 2016.

4 **FIRST CAUSE OF ACTION:**
5 **DISCRIMINATION IN VIOLATION**
6 **OF THE AMERICANS WITH DISABILITIES ACT**

7 Plaintiff repeats and realleges each and every pertinent allegation contained in and every
8 other pertinent paragraph contained in this Complaint, as if set forth fully herein.

9 36. Plaintiff is a person with a disability pursuant to the Americans with Disabilities Act of
10 1990 as amended in January 2009 having sustained a back injury in 2012 and again in 2015
11 which substantially limited one or more his major life activities including standing, bending,
12 pushing, pulling and working.

13 37. Plaintiff was qualified for his job and capable of performing the essential functions of the
14 job with or without a reasonable accommodation and had been performing his job duties with an
15 accommodation for two years prior to Defendant's termination of his employment.

16 38. Plaintiff had a record of an ADA qualifying disability dating back to 2012 of which
17 Defendant was well-aware.

18 39. Defendant regarded Plaintiff as being disabled and provided Plaintiff with a reasonable
19 accommodation beginning in 2013 for his disability which resulted from his 2012 industrial
20 accident.

21 40. Defendant denied Plaintiff's suggestion of reasonable accommodation to allow him to
22 remain in the EDR, a position he held for almost a year. Defendant offered no other reasonable
23 accommodation nor did it explore with Plaintiff what other reassigned positions he might be able
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1 to fill with or without an accommodation. Reasonable accommodation including, but not limited
2 to, job modification, modification of policies, and job reassignment were available.

3 41. Defendant failed to engage in an interactive process calculated to develop a reasonable
4 accommodation for Plaintiff, as more fully detailed herein. Such reasonable accommodation
5 would have permitted Plaintiff to perform the essential functions of his job and would not have
6 caused any undue hardship on Defendant.

7 42. Plaintiff posed no direct threat to the health or safety to himself or others in the
8 workplace.

9 43. Defendant's acts constituted discrimination against Plaintiff with respect to his
10 compensation, terms, conditions, or privileges of employment in violation of the Americans with
11 Disabilities Act as amended in January 2009.

12 44. Plaintiff suffered emotional distress, humiliation, and mental anguish.

13 45. Plaintiff suffered both economic and general non-economic damages as a direct and
14 proximate result of Defendant's violation of the federal law.

15 46. Plaintiff has been required to hire an attorney and expend attorney fees and incur costs to
16 pursue and protect his legal rights by this action.

17 47. Defendant's actions were taken with willful, wanton and reckless disregard of Plaintiff's
18 rights under federal law. Plaintiff should be awarded punitive damages against the Defendants to
19 make an example of the Defendants and to deter future conduct of this nature.

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23 **SECOND CAUSE OF ACTION:**
24 **RETALIATION**
25 **IN VIOLATION OF THE AMERICANS WITH DISABILITIES ACT**

26 Plaintiff repeats and realleges each and every pertinent allegation contained in and every
27 other pertinent paragraph contained in this Complaint, as if set forth fully herein.

1 48. Plaintiff was engaging in conduct protected under the ADA when requesting an
2 accommodation under the ADA.

3 49. Plaintiff was subjected to a materially adverse employment action at the time, or after, the
4 protected conduct occurred, including Defendant's termination Plaintiff's employment on April
5 21, 2016.

6 50. There is a causal link between the protected activity and the adverse employment action
7 with Plaintiff's termination coming immediately on the heels of his industrial injury which
8 resulted in his ADA qualifying disability as explained herein.

9 51. Plaintiff's protected activity was the "but for" cause or motivating factor, in the adverse
10 employment action.

11 52. Plaintiff suffered emotional distress, humiliation, and mental anguish.

12 53. Plaintiff suffered both economic and general non-economic damages as a direct and
13 proximate result of Defendant's violation of the federal law.

14 54. Plaintiff is entitled to equitable and injunctive relief to, as the court deems appropriate,
15 make him whole and to require that the Defendants no longer engage in retaliation against him in
16 violation of the ADA.

17 55. Plaintiff has been compelled to hire an attorney and expend attorney fees and incur costs
18 to pursue and protect his legal rights by this action.

19 56. As a result of Defendant's willful, wanton, and reckless violations of Plaintiff's rights
20 under federal law, Plaintiff should be awarded punitive damages against the Defendants to make
21 an example of the Defendants and to deter future conduct of this nature.

22 ...

23 ...

1 **WHEREFORE**, Plaintiff expressly reserves the right to amend his Complaint at or
2 before the time of trial of the action herein to include all items of damages not yet ascertained,
3 and demands all applicable relief including, but not limited to:

4 A. All applicable relief provided for provided for by the American With Disabilities Act
5 of 1990 as amended in January 2009 and Nevada common law including, but not
6 limited, to the following:

- 7 1. Money damages to be proved at trial;
- 8 2. Economic damages including, but not limited to, lost wages and benefits of
9 employment, incidental and consequential damages;
- 10 3. General damages including emotional distress and general economic harm;
- 11 4. Punitive and/or Exemplary damages to deter the Defendants from future
12 malicious, fraudulent, and oppressive conduct of a similar nature;
- 13 5. Pre-judgment and post-judgment interest on the amounts awarded at the
14 prevailing legal rate;
- 15 6. Equitable, extraordinary and/or injunctive relief in the form of an order
16 reinstating Plaintiff to his position in accordance with the Americans with
17 Disabilities Act
- 18 7. For an additional amount to account for any increased taxes Plaintiff may be
19 called upon to pay in relation to any award made herein;
- 20 8. Reasonable attorney fees, reasonable expert witness fees, and other costs of
21 the action pursuant to federal and state statute, agreement, or court rule;
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1 B. A trial by jury on all issues that may be tried to a jury; and/or

2 C. For such other and further relief as the Court may deem just and proper.

3 DATED this 9th day of June, 2017.

4
5 /s/ Victoria L. Neal

6 JAMES P. KEMP, ESQ.

7 Nevada Bar No: 6375

8 VICTORIA L. NEAL, ESQ.

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CERTIFICATE OF SERVICE

The undersigned certifies that the within and foregoing FIRST AMENDED COMPLAINT was served to all counsel and persons associated with this case via the court's CM/ECF system on the date below.

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R. Calder Huntington, Esq.
MGM RESORTS INTERNATIONAL
840 Grier Drive
Las Vegas, NV 89119

*Attorneys for Defendant,
BELLAGIO, LLC*

DATED this 9th day of June, 2017.

/s/ Victoria L. Neal
VICTORIA L. NEAL, ESQUIRE

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